

Editor's note: Reconsideration denied by order dated March 16, 1977; Appealed -- aff'd, Civ. No. C-77-633 (N.D.Cal. May 19, 1977)

COMMITTEE TO SAVE OUR PUBLIC LANDS

IBLA 76-484

Decided February 16, 1977

Appeal from a Bureau of Land Management decision to permit the construction of a temporary logging access road over public land and a determination that the preparation of an environmental impact statement was not a prerequisite to the granting of such right-of-way. CA 3051.

Affirmed.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Where an administrative decision is made that a proposed action is not a major federal action which will significantly affect the quality of the human environment, so that no environmental impact statement need be filed, that decision will be affirmed on review if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of his study of such record.

APPEARANCES: Bryan W. Gaynor, Esq., Willits, California, for the appellant; Joseph A. Darrell, Esq., San Francisco, California, for Louisiana-Pacific Corporation; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, and Gail L. Achterman, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Louisiana-Pacific Corporation (L-P) has applied for a right-of-way to construct a road across certain public lands in

Mendocino and Trinity Counties, California. L-P desires to construct the road to provide access to lands owned by one Richard Wilson, on which L-P holds timber rights, and to reach extensive property owned by L-P itself which is "landlocked" by federal lands.

The proposed term of the right-of-way is 5 years, following which the road would be "put to sleep" in the manner described infra. The road to be built would connect with a private road already built and owned by L-P. Although the right-of-way applied for traverses 4.7 miles of public land, the first 0.9 mile of road already exists, having been constructed in the past, and this segment is presently suitable for transporting forest products. Thus, the granting of the right-of-way would entail the actual construction of only 3.8 miles of road, same to be a single lane with curve widening and turnouts. The road would facilitate the harvest and removal of about 30 mm board feet of privately-owned timber.

The land affected is within what is known as the Big Butte Area, which is bounded on the north by Six Rivers National Forest, on the east by Mendocino National Forest and lands owned by Wilson, and on the south and west by lands owned by Wilson and L-P. The Yolla Bolly Wilderness Area lies generally to the northeast and begins about 2 miles from the top of Big Butte, the topographic feature from which the subject area takes its name. The Yolla Bolly Wilderness Area covers 111,000 acres. Public lands in the Big Butte Area are included in the BLM's East Mendocino Management Framework Plan. This plan envisaged that the Big Butte Area lands would be maintained in a primitive category pending further study and the development of plans by the Forest Service with respect to the nearby lands under its jurisdiction. The two federal agencies have agreed to act cooperatively and in consultation on a development plan for all federal land in the area.

The California State Office of the Bureau of Land Management, which received L-P's application, conducted an environmental analysis, the results of which were reflected in an Environmental Analysis Report (EAR). This report addressed all constituents of the prevailing natural environment which could be affected by the granting of the right-of-way, such as topography, soils, geology, water, air, climate, vegetation, wildlife, etc. It also considered socio-economic factors, recreation, historic and archeological values, and area-wide potential for future land use devotion. The mitigatable or avoidable adverse consequences of the proposal were catalogued and discussed, as were those which were deemed unavoidable and which could not be mitigated. The EAR was prepared after extensive consultation with interested federal, state and local agencies of government, conservation groups and landowners. The report concluded:

Impacts have been identified upon soil stability, water quality, air quality, wildlife, archaeological values and aesthetic quality. Most impacts are localized or transitory or can be mitigated. Residual impacts are not significant. Long-term productivity will not be significantly affected. There will be no irreversible nor irretrievable commitment of resources of any significance.

Possible alternative actions available to BLM have been identified which would satisfy the need for which this action is to be taken. The alternatives have been discarded because they are impractical or more damaging to the environment.

In addition to the EAR, different personnel of the California State Office conducted other field examinations and rendered extensive reports of their findings, which reports contribute to a further understanding of the effect of the proposed right-of-way. The first of these, styled the "Field Report," deals with a thorough study of the land and environs to ascertain the feasibility of the proposed right-of-way. This study focuses on many of the same environmental concerns addressed in the EAR, but on a more practical plane, in that it proposes specific technical procedures and requirements to avoid or to minimize the potential degradation of environmental values. Appended to the report are 12 pages of proposed stipulations and conditions especially calculated to achieve this objective.

The third report by BLM personnel, based upon factual field examination, is the Appraisal Report. This document virtually duplicates much of the study of environmental factors which is contained in the Field Report and the EAR. However, its purpose is to assess the proper value attributable to the land and resources affected.

All three reports are extensively supplemented by maps, photographs and documents.

The EAR was made subject to public review and comment. The responses were studied by the Chief, Planning Coordination Staff, and analyzed and evaluated in his report to the State Director.

Although a letter dated December 5, 1975, from BLM's California State Office to L-P strongly indicated that a decision had been made to issue the right-of-way without preparing an environmental impact statement, a subsequent letter by the State Director, dated December 15, 1975, asserts emphatically that no such decision had been made and that a determination was still pending. Subsequently, however, the State Director did make

such a decision which he communicated to L-P and to the Citizens' Committee.

The Citizens' Committee protested the decision to the State Director and filed a notice of appeal to this Board. It also filed suit in the District Court for the Northern District of California seeking an injunction to prevent the issuance of the right-of-way until, inter alia, the Bureau completed an EIS. On January 8, 1976, the Court issued an order temporarily restraining the Department from granting the right-of-way pending a hearing before the Court. On February 12, 1976, the Court ordered that Citizens' Committee be accorded the right to an administrative appeal before this Board and enjoined the issuance of the right-of-way pending a final determination that the right-of-way permit in question may be issued without an EIS.

The appeal to this Board has been briefed exhaustively by L-P, Citizens' Committee, and by the Office of the Solicitor on behalf of BLM. Appellant Citizens' Committee has moved this Board to order a fact-finding hearing, which motion has been opposed by L-P and BLM.

The central issue with which this appeal is concerned is whether the BLM's California State Director had a proper and sufficient basis on which to found a reasonable determination that the proposed right-of-way does not constitute a major federal action which will significantly affect the quality of the human environment. 1/

We find in the affirmative.

Specifically we find first that the proposed action does not constitute a "major" federal action within the contemplation of the Act (NEPA). The EAR shows that the compacted road surface will occupy only 9 acres, with an additional 9 acres being devoted to cut and fill slopes and waste areas. Thus, the area to be directly disturbed will comprise only 18 acres of the approximate 10,000 acres in the Big Butte Area. The Second Circuit Court of Appeals has held that for an environmental impact statement to be required, federal projects or actions must be both a "major" action and "significantly" affect the environment. Hanly v. Mitchell, 460 F.2d 640 (2nd Cir. 1972), cert. denied, 409 U.S. 990, later appealed, 471 F.2d 823, cert. denied, 412 U.S. 936, on appeal following remand, 484 F.2d 448, cert. denied, 416 U.S. 936 (1974); Town of Groton v. Laird, 353 F. Supp. 344 (D. Conn. 1972).

1/ Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1970).

We recognize that in the Ninth Circuit the question of whether a proposed action is "major" cannot be determined solely on the basis of size, economics, or other nonenvironmental considerations. See City of Davis v. Coleman, 521 F.2d 601 (Fn. 15) (9th Cir. 1975).

Nevertheless, the relatively small area of the undertaking is a cogent factor to be considered. Similarly, the temporary nature of the right-of-way tends to diminish its importance, as does the rehabilitative requirement to "put the road to sleep" once it has served its purpose. The term of the permit will be 5 years, after which the road will be closed to vehicular traffic and "put to sleep" by crossdraining, scarification of the roadbed, and seeding. We make this finding in full cognition of the holding in Simmans v. Grant, 370 F. Supp. 5 (D. Tex. 1974), to the effect that an action which would otherwise be major is not disqualified as a "major" action simply because it is only temporary in nature. We find that the inherently minor character of the proposed action in this case is emphasized, rather than established, by its temporary nature.

In Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973), a case involving many striking similarities to the one here at issue, the Court upheld the determination by the Corps of Engineers that the issuance of a dredging permit and authority for the construction of a proposed marina, fishing piers and a boat basin on a portion of North Carolina's outer banks was not an action which required the preparation of an EIS. The Court held also that the District Engineer's determination was neither arbitrary nor an abuse of his discretion, in that he gave extensive notice of the proposal to other governmental agencies, and to non-governmental groups and interested individuals. Adverse comments were received from private organizations and individuals, but the Court found that these were substantially rebutted by the governmental agencies having appropriate subject matter expertise. On the basis of the administrative record thus compiled the Court affirmed the District Court's finding that the Corps of Engineers "reached a reasonable decision in not requiring an impact statement before granting the permits in this case." The Court noted that the project in question was to be financed wholly from private sources, the construction was to be performed privately and not by the Corps, that the administrative record indicated that the effect of granting the permit would be isolated, yielding little or no impact outside the immediate area.

Other cases holding that no major federal action was involved include Citizens for a Balanced Environment v. Volpe, 376 F. Supp. 806 (D. Conn. 1974); Platte Area Recreation Committee v. Brinegar, F. Supp. (D. Colo. 1974); Citizens Organized to Defend the Environment v. Volpe, 353 F. Supp. 520 (D. Ohio 1972); Julius v. City of Cedar Rapids, 349 F. Supp. 88 (D. Iowa 1972).

Another case closely akin to the one at issue is Kisner v. Butz, 350 F. Supp. 310 (D. W.V. 1972), involving the construction of 4.3 miles of gravel, one-lane roadway in the Monongahela National Forest through an area that had been designated as black bear habitat, one of four such areas in the state. Plaintiffs urged the preservation of the area as primitive wilderness for wildlife, hiking, aesthetics, and ecological purposes. The Court found that the construction of this road segment would not "have a significantly adverse impact on the natural ecology, and does not appear to be inconsistent with the National Environmental Policy Act's goals and purposes." Id. at 322. The Court concluded that the road construction did not constitute "a major federal action."

Recognizing further that a finding that the proposed action is not "major" does not of itself preclude the filing of an EIS, 2/ we proceed to our next finding, i.e., that the proposed action will not significantly affect the quality of the human environment. The record establishes that the route selected is the least environmentally damaging of all other possible alternative routings. Nothing in the record indicates a likelihood that the human environment will be "significantly" affected. It would not be practical to incorporate in the text of this decision a recitation of all of the findings, mitigating circumstances, arguments, contentions and rebuttals reflected by the record in this case, and to dispose of each. Suffice it to say that after careful review of the administrative record on which the decision was based, and our study of all of the pleadings filed since, we are of the opinion that appellant's projection of a catalog of severe environmental consequences projected for many years into the future is conjectural, hypothetical and unwarranted. Even were we to acknowledge certain of the consequences projected by appellant, there is no showing that these would significantly affect the human environment. 3/ In a somewhat analogous case the BLM's State Director for Nevada made a decision to proceed with the round-up and removal of 400 wild horses from Stone Cabin Valley without the prior rendition of an EIS. This decision was

2/ The guidelines of the Council on Environmental Quality provide:

"* * * In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable * * *." 40 CFR 1500.6(a).

3/ The author has emphasized the word "human" out of concern for the fact that although the word must be accorded legislative significance it is frequently omitted in discussions of the requirements of the Act.

based upon conclusions reached after study of the Environmental Analysis Record. Upon suit to enjoin the action, the Court held that BLM was not required to file an EIS prior to making the decision, since the round-up would not have significant effect on the environment. American Horse Protective Association v. Frizzell, 403 F. Supp. 1206 (1975). The Court noted that BLM had not specified whether they considered that the action was not major, not Federal, not significantly affecting the environment or not affecting the human environment. 403 F. Supp. at 1219. (Emphasis by the Court.) Having decided that the round-up would not have significant effect on the environment, the Court found it unnecessary to decide whether the action fitted any of the other elements.

In the instant case we find that the environmental impact on the human environment is not significant in that the effect is relatively small and will be largely confined to the immediate area.

Next, we find that the State Director had a proper and ample basis on which to found a reasonable determination that no EIS was required. The administrative record was extensive and comprehensive, there was a full effort to involve other concerned federal, state and local agencies of government and interested private groups and individuals. Responsive commentary was received and carefully considered and certain meritorious suggestions for modification of the proposal were adopted. The State Director had full discretionary authority to make the decision, and there is nothing to suggest that he acted hastily or arbitrarily, or that he abused his discretion, nor is there any indication that there was an absence of good faith. In Maryland National Capitol Park and Planning Comm. v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973), the Court ruled that in an environmental assessment statement an agency had to: 1) take a "hard look" at the problem, as opposed to setting forth bald conclusions; 2) identify the relevant areas of environmental concern; and, 3) make a convincing case that environmental impact is insignificant. 487 F.2d at 1039-40. Accord, Fund for Animals v. Frizzell, F. Supp. 8 ERC 1393 (D. D.C. 1975). We find that the environmental analysis record in this case meets these criteria.

Appellant's request for an evidentiary hearing is denied.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE FREDERICK FISHMAN CONCURRING SPECIALLY:

While in a superabundance of caution I initially had opted for a hearing before an Administrative Law Judge, I cannot disagree that the record supports the affirmance of the BLM decision.

Upon further reflection I have concluded that additional administrative proceedings would lend themselves to being reasonably construed as harassment of Louisiana-Pacific Corporation.

Fredrick Fishman

Administrative Judge

